BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAYMOND ROGER LYTLE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,041,344
MIES & SONS TRUCKING	)	
Respondent	)	
AND	)	
	)	
AMERICAN INTERSTATE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 28, 2010, Award and the June 24, 2010, Order Nunc Pro Tunc of Administrative Law Judge Thomas Klein (ALJ). Claimant was found to have suffered an injury resulting in a 13 percent whole person permanent partial impairment on a functional basis, followed by a permanent partial general disability (work disability) of 83 percent based on a task loss of 66.667 percent and a wage loss of 100 percent.

Claimant appeared by his attorney, Phillip B. Slape of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Terry J. Torline of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award as amended by the Order Nunc Pro Tunc of the ALJ. The Board heard oral argument on August 20, 2010.

ISSUES

1. Did claimant suffer personal injury by accident which arose out of and in the course of his employment with respondent? Respondent admits that the truck accident, which occurred early on the morning of July 22, 2008, did occur and that claimant was driving for respondent at the time of the accident. However, respondent contends that claimant suffered no injury from that accident and, thus, fails in his burden of proving "personal injury by accident" under K.S.A. 2008 Supp. 44-501(a). Claimant contends that the accident occurred as he described and as a result of

that accident, claimant was injured, was transported to the hospital and suffered permanent injuries from that accident. Therefore, the Award of the ALJ should be affirmed.

2. Should the costs associated with the ambulance ride to the hospital on the morning of the accident be paid as authorized or unauthorized medical expense? This issue was raised by respondent's counsel to the Board during oral argument. It does not appear to have been briefed to the Board. Additionally, at the regular hearing, when the statement for the ambulance ride was introduced as claimant's exhibit 3, there was no objection.[1]

3. What is the nature and extent of claimant's injuries and disability resulting from the accident on July 22, 2008? Claimant contends that he suffered serious injuries with permanent physical impairment and a permanent partial general (work) disability under K.S.A. 44-510e. Respondent contends that claimant suffered no permanent effects from the accident and the award for any permanent disability, both functional and work, should be denied.

FINDINGS OF FACT

Claimant began working for respondent as a truck driver on March 22, 2005. Early in the morning on July 22, 2008, while driving for respondent, claimant swerved to miss a herd of deer. Claimant lost control of the truck, running his truck into a rock wall. This caused the truck to lay over on its side, and claimant was injured. Claimant was able to get out of the truck, but needed assistance getting to the ground. Claimant testified that he was dazed and confused, was in pain after hitting his head and was having trouble walking. Claimant was transported by ambulance to the Greenwood County Hospital and from there to Via Christi St. Francis Hospital (St. Francis) that same day. Claimant was released from St. Francis the next day and was referred to board certified orthopedic surgeon John P. Estivo, D.O., on August 13, 2008.

Claimant advised Dr. Estivo of lumbar spine pain and right hip pain. Multiple x-rays and CT scans taken before Dr. Estivo's examination revealed normal findings in the right hip and cervical spine. The lumbar spine studies indicated bulging discs at L3-4 and L4-5, but were otherwise negative. Claimant denied prior low back and right hip problems, but notified the doctor that he had a history of back problems. Dr. Estivo recommended MRIs of the lumbar spine and right hip. The right hip MRI was read as normal, while the lumbar spine MRI revealed mild spinal stenosis and the above discussed disc bulges. The MRI results were discussed during the August 27, 2008, examination. At that time, claimant was referred for physical therapy and provided work restrictions of no lifting over 20 pounds and limited bending, twisting and stooping no more than one-third of a full workday.

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[1] R.H. Trans. at 28.

Claimant was restricted from climbing and squatting entirely. On September 22, 2008, claimant reported to Dr. Estivo that he was having much less discomfort. He was continued on physical therapy and provided a second epidural injection. This resulted in a decrease in pain symptoms. Claimant reported at the September 22 examination that his right leg pain had decreased substantially, but claimant still experienced slight pain in the right leg at times.

At the next examination on October 20, 2008, Dr. Estivo recommended a third and final epidural injection and continued physical therapy. By the November 5, 2008, examination, claimant was denying any leg pain, but did still have right-sided spine pain. Claimant displayed a full range of motion in the right hip and had only a slight antalgic gait. Dr. Estivo rated claimant pursuant to the fourth edition of the AMA *Guides*[2] at 5 percent to the whole person for the lumbar spine strain. Permanent restrictions of no lifting greater than 40 pounds and limited bending, twisting or stooping no more than one-third of the day were also imposed.

At the time of his deposition, Dr. Estivo was provided a copy of a DVD of claimant entering and leaving Wal-Mart. The DVD only lasts about 6 minutes and does nothing but display claimant walking and pushing a grocery cart and unloading three to four sacks. After viewing the DVD, Dr. Estivo modified his impairment to zero percent and testified that claimant required no restrictions. Dr. Estivo agreed that claimant did not violate any of the restrictions placed on him by the doctor in the DVD. However, Dr. Estivo testified that the actions displayed by claimant on the DVD showed claimant moving and walking much easier than claimant displayed in the doctor's office. At the time of claimant's final examination, claimant had a "very dramatic gait".[3] Dr. Estivo agreed that claimant may be walking with a slight limp in the DVD, but it would not qualify as a significant limp. During the second part of the DVD, when the camera displayed claimant walking through a parking lot without cars blocking the view, claimant displayed no limp. Claimant had earlier testified that he walked with a significant limp and used a cane 90 to 95 percent of the time. Dr. Estivo acknowledged that there was no medical reason for claimant to use a cane.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist George G. Fluter, M.D., for an examination on January 15, 2009. The history provided to Dr. Fluter indicated that claimant hit his head at the time of the accident and may have blacked out for up to 5 minutes. Claimant also told Dr. Fluter that he was hospitalized for three days.

During the examination, claimant displayed tenderness over the posterior superior iliac spine and sacroiliac joints and the greater trochanters more on the right than the left.

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[3] Estivo Depo. at 31.

Claimant was diagnosed with lumbosacral strain/sprain with multilevel lumbar discopathy. Claimant probably had trochanteric bursitis with an abnormal gait and possible bilateral lower extremity radiculitis. Dr. Fluter determined that claimant's degenerative changes had been aggravated and rendered symptomatic in the lumbar spine from the accident. Claimant was rated at 10 percent impairment to the whole body for the lumbar spine and 3 percent whole person impairment for the trochanteric bursitis in the right hip with the abnormal gait. Combined, claimant had a 13 percent permanent partial whole body disability pursuant to the fourth edition of the AMA *Guides*.[4] Claimant was restricted from lifting, carrying, pushing and pulling to 20 pounds occasionally and 10 pounds frequently. Bending, stooping and twisting were restricted to only occasional, and claimant should avoid prolonged sitting, standing and walking. Dr. Fluter testified that during his examination of claimant, there was evidence of symptom magnification.

Of the 24 tasks on the list prepared by vocational expert Doug Lindahl, Dr. Fluter testified that claimant was unable to perform 16 for a task loss of 67 percent. Dr. Fluter was asked to view the DVD and opined that it did not change his opinion of claimant's condition. He noted that claimant appeared to limp in the DVD and walked with a slow and guarded gait.

In the three years leading up to the accident, claimant was involved in three other motor vehicle accidents. He also received three speeding tickets, one illegal lane change conviction, one driving left of center conviction, and one failure to stop in a construction zone conviction, and was convicted of falsifying his log book. Due to the multiple accidents and convictions, respondent's automotive insurance company refused to continue to insure claimant. At that time, claimant's employment with respondent was terminated, as it would have been illegal for respondent to continue to employ claimant without insurance.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

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[4] AMA *Guides* (4th ed.).

[5] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[8]

K.S.A. 2008 Supp. 44-501(a) states:

> (a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

In this instance, claimant was driving for respondent when he lost control of his truck. There is no dispute that claimant was in the course of his employment when this accident occurred. Additionally, the accident and resulting injuries were caused by this accident. It is in the nature of a truck driver to be on the road at odd hours, covering many hundreds of miles in a single drive. The fact that a truck driver may encounter hazzards on the road comes as no surprise. Here, claimant encountered a herd of deer which caused him to swerve and loose control of his truck. The resulting accident caused injuries to claimant which were sufficient enough to require transportation in an ambulance to the local hospital, with a subsequent transfer to St. Francis in Wichita.

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[7] K.S.A. 2008 Supp. 44-501(a).

[8] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

Thereafter, claimant underwent a series of treatments, including physical therapy and epidural injections, to counter the results of the accident. Dr. Estivo, the authorized treating physician, provided care for claimant for several months. Respondent's contention that claimant failed to prove that he suffered personal injury by accident which arose out of and in the course of his employment with respondent is without merit. Respondent's efforts in this instance would be more properly directed toward the nature and extent of any such injuries.

K.S.A. 2008 Supp. 44-510h(a) states:

> (a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

The cost of any ambulance rides to the various hospitals due to this accident are the responsibility of respondent and its insurance company and are to be paid as authorized medical expenses. It does not appear that this issue was raised to the ALJ as there was no objection at the regular hearing when the bill was introduced into evidence. Plus, no issue dealing with the cost of the ambulance rides was raised at regular hearing. Additionally, this issue was not appealed to nor briefed to the Board. While it was presented to the Board during oral argument, the raising of this issue to the Board appears disingenuous.

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[9]

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee

[9] K.S.A. 44-510e(a).

> performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[10]

In this instance, the nature and extent of claimant's injuries and disability hinge on not only the medical evidence, but also, to a significant extent, on the credibility of claimant. The accident history provided by claimant varies, depending on to whom he was speaking. It is uncontroverted that claimant's driving history is suspect. Several problems were apparently hidden from respondent, including multiple convictions, other accidents, and one instance of a falsified log book. Claimant's driving history was so clouded that respondent's insurance company was no longer willing to insure him. Additionally, claimant painted a dire picture of his physical limitations. He testified to having a significant limp and was required to use a cane 90 to 95 percent of the time. The DVD taken of claimant fails to support claimant's alleged limitations. Dr. Estivo, the authorized treating physician, determined that the abilities displayed by claimant on the DVD differed significantly from the physical limitations displayed during his evaluations of claimant during treatment. It is difficult for the Board to accept claimant's contentions of significant physical limitations when the actions displayed on the DVD appeared almost limitless. The Board finds that claimant has failed to prove that he suffered any permanent injury or disability as the result of this accident. While claimant would be entitled to temporary benefits in the form of medical compensation, no permanent award is appropriate. The determination by the ALJ that claimant suffered a functional impairment and a permanent partial (work) disability is reversed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award and Order Nunc Pro Tunc of the ALJ should be affirmed in that claimant suffered an accident with resulting temporary injuries as the result of the automobile accident on July 22, 2008, the ambulance expenses are ordered as authorized medical treatment and any medical treatment provided as authorized medical remains as ordered by the ALJ. However, the award of any permanent partial disability compensation, both functional impairment and work disability, is denied and the award by the ALJ on those issues is reversed.

AWARD

[10] K.S.A. 44-510e.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award and Order Nunc Pro Tunc of Administrative Law Judge Thomas Klein dated May 28, 2010, and June 24, 2010, respectively, should be, and are hereby reversed with regard to the award of permanent disability, both functional and work disability, but the award is affirmed in all other regards so long as it does not conflict with the findings, decisions and orders contained herein.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Raymond Roger Lytle, and against the respondent, Mies & Sons Trucking, and its insurance carrier, American Interstate Insurance Company, for an accidental injury which occurred on July 22, 2008, and based upon an average weekly wage of $910.23.

Claimant is entitled to zero weeks of temporary total disability compensation, with no permanent disability from this injury.

As of the date of this award, the entire amount of this award, which is limited to claimant's medical benefits, is due and owing and ordered paid in one lump sum minus any amounts already paid.

IT IS SO ORDERED.

Dated this ____ day of September, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissent from the opinion of the majority that claimant is not entitled to any permanent partial disability compensation. Although claimant was not entirely forthcoming about his medical history, there is no evidence that claimant had any prior restrictions that prevented him from doing his job with respondent. As a direct result of the work-related accident, claimant was given permanent restrictions by Drs. Estivo and Fluter. After viewing a surveillance video showing claimant walking and carrying groceries, Dr. Estivo changed his opinion and removed all restrictions. This change of opinion was despite the admission by Dr. Estivo that the video did not show claimant violating any of his restrictions. Dr. Estivo agreed that it would be appropriate for him to examine claimant again before rendering a new opinion. Nevertheless, Dr. Estivo did change his opinion based upon his recollection of how claimant had presented himself at his office versus how he appeared in the video. Dr. Estivo did not examine claimant again and had not seen claimant in his office for over a year before viewing the video. Dr. Estivo had obviously seen many other patients in the interim. It seems unlikely that the doctor would have a clear recollection of claimant after that long. In contrast, Dr. Fluter did not change his opinions concerning claimant's need for permanent restrictions after he viewed the video. The undersigned find the opinion of Dr. Fluter more credible with respect to restrictions and would, therefore, affirm the Administrative Law Judge's award of permanent partial disability compensation.

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BOARD MEMBER

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BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge